SUPREME COURT, U. S.

DEC 5 1966

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1966

No. 829

UNITED STATES OF AMERICA,
Appellee,

vs.

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Appellant.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ELMER NAFZIGER,
916 Illinois Building,
Springfield, Illinois,
Attorney for Appellant

GRAY HERNDON,
KNOWLES LAIRD,
916 Illinois Building,
Springfield, Illinois

SCHNEPP & BARNES, PRINTERS, INC., SPRINGFIELD, ILL.

INDEX

	Page
Opinions and Orders Below	1
Jurisdictional Grounds	2
Questions Presented for Review	5
Statement of the Case	7
Basis for Federal Jurisdiction in the Court of First Instance	12
The Federal Questions are Substantial-Argument	13

Appendixes

"A"—Opinion of the U.S. Court of Appeals for the Seventh Circuit	1a
"B"—Appellant's Petition for Rehearing	4a
"C"—Copy of the Court of Appeals Order denying Petition for Rehearing	13a
"D"—Opinion findings of fact and Conclusion of Law of the District Court for the United States for the Eastern District of Illinois	14a
"E"—Final Order of the District Court	23a
"F"—Decree in the Court of Common Pleas of Stark County, Ohio, in Raff vs. Bowman	25a
"G"—Decree in the Court of Common Pleas of Stark County, Ohio in Raff against Walker	28a
"H"—Notice by Land Office to Walker of March 3, 1855	31a
"I"—Affidavit of Actual Settlement of Cultivation by John Nikles of February 4, 1860	33a

Page

"J"—Letter of S. C. Gibson on behalf of Walker of May 30, 1860 ..... 34a

"K"—Certificate for Patent Issued to John Nikles on November 12, 1860 ..... 35a

Table of Cases

Atteberry vs. Blair, 244 Ill. 363, 370; 91 N.E. 475, 478 (1910) 4, 14

Cornelius vs. Kessel, 128 U.S. 456, 459, 461; 32 L. Ed. 482, 483, 484 (1888) 3, 15

El Paso Brick Co. vs. McKnight, 233 U.S. 250, 258; 58 L. Ed. 943, 948 (1913) 4, 33

Galt vs. Galloway, 29 U.S. (4 Peters) 332; 7 L. Ed. 876, 880 (1830) 4, 27

Guaranty Savings Bank vs. Bladow, 176 U.S. 448, 453; 44 L. Ed. 540, 542 (1900) 3, 19

Holt vs. Murphy, 207 U.S. 407, 414; 52 L. Ed. 271, 273 (1908) 4, 28

Keane vs. Brygger, et al., 160 U.S. 276, 286, 287; 40 L. Ed. 426, 429, 430 (1895) 4, 22

Knapp vs. Alexander-Edgar Lumber Co., 237 U.S. 162, 169; 59 L. Ed. 894, 899 (1915) 3, 19

Lindsey vs. David Hawes, 67 U.S. 554, 556, 557; 17 L. Ed. 265, 267 (1863) 3, 17

Love vs. Annie Flahive, et al., 205 U.S. 195, 201, 202; 51 L. Ed. 768, 771 (1906) 4, 21

Lytle, et al., vs. Arkansas 9 Howard, 314, 331, 332; 13 L. Ed. 153, 160 (1850) 4, 25, 27

Page

Moss vs. Dowman, 176 U.S. 413, 418; 44 L. Ed. 526, 528 (1900) 3, 23, 33

Northern Pacific Railroad Company vs. Amacker, 175 U.S. 564, 567; 44 L. Ed. 274, 275 (1900) 4, 32

Orchard vs. Alexander, 157 U.S. 372, 378, 383; 39 L. Ed. 737, 740, 741 (1895) 3, 18, 20, 24

Svor vs. Morris, 227 U.S. 524, 529; 57 L. Ed. 623, 626 (1913) 3, 14, 19

Taylor's Lessee vs. Myers, 20 U.S. 23, 25, 26; 5 L. Ed. 387, 388 (1822) 4, 23

United States vs. Commonwealth, etc., 193 U.S. 651, 656; 48 L. Ed. 830, 832 (1904) 4, 26, 27

United States vs. Juan Chaves, 159 U.S. 452, 463, 464; 40 L. Ed. 215, 220 (1895) 4, 29, 30

United States vs. J. Francisco Chavez, et al., 175 U.S. 509, 520, 523; 44 L. Ed. 255, 259, 260 (1899) 4, 29

United States vs. Pendell, et al., 185 U.S. 189, 198-200; 46 L. Ed. 866, 871 (1901) 4, 29

United States vs. Fullard-Leo, 331 U.S. 256, 270, 271, 281; 91 L. Ed. 1474, 1484, 1485, 1490 (1947) 4, 31

United States vs. Fullard-Leo, 133 F. 2d 743, 747 23

Statutes

4 Stat. L. 420 17

5 Stat. L. 453 17

28 U.S.C. Sec. 1345 12

28 U.S.C. Sec. 1291 12

Page

21 Stat. L. 140, U.S.C. Title 43, ch. 7, Sec. 202 25

19 Stat. L. 102, 10 U.S.C. Sec. 842 24

Code of Federal Regulations

Code of Federal Regulations 12, 34

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1966

No. _____

UNITED STATES OF AMERICA,
Appellee,

vs.

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
Appellant.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Opinions and Orders Below

The opinion of the United States Court of Appeals for the Seventh Circuit entered on June 29, 1966, is reported in 365 F. 2d 121. A copy of that opinion is attached hereto as Appendix "A". A copy of the petition for rehearing to the U.S. Court of Appeals is attached hereto as Appendix "B". A copy of the order of the United States Court of Appeals for the Seventh Circuit, entered September 7,

1966, denying the petition for rehearing, is attached hereto as Appendix "C". A copy of the opinion, findings of fact and conclusions of law of the District Court, entered August 24, 1965, is attached hereto as Appendix "D". A copy of the final order of the District Court, entered September 23, 1965, which was the order appealed to the United States Court of Appeals, is attached hereto as Appendix "E".

Jurisdictional Grounds

This suit was brought by the United States in the District Court of the United States for the Eastern District of Illinois to get possession of part of a quarter section of farm land which was entered, improved, bought and paid for by a settler named Nikles, more than one hundred years ago, and had never been in possession of nor claimed by the United States during that time.

The judgment of the Court of Appeals, sought to be reviewed (Appendix "A") is dated June 29, 1966, and was entered on that date.

The order of the Court of Appeals denying a rehearing (Appendix "C") is dated September 7, 1966.

The jurisdiction of this Court for granting a petition for certiorari is found in 28 U.S.C. Section 1254(1). Appellant contends that the Court of Appeals decision and its order denying the petition for rehearing are in conflict with applicable decisions of this Court within the meaning of subparagraph (b) of paragraph 1 of Rule 19 of Supreme Court Rules.

A.

The decision of the Court of Appeals which upheld the cancellation of Nikles' certificate without notice and with-

out an opportunity to be heard was contrary to the following decisions of the United States Supreme Court.

Cornelius vs. Kessel, 128 U.S. 456, 459, 461, 32 L. Ed. 482, 483, 484 (1888);

Lindsey vs. Hawes, 67 U.S. 554, 556, 557, 17 L. Ed. 265, 267 (1863);

Orchard vs. Alexander, 157 U.S. 372, 383, 39 L. Ed. 737, 741 (1895);

Svor vs. Morris, 227 U.S. 524, 529, 57 L. Ed. 623, 626;

Knapp vs. Alexander-Edgar Lumber Co., 237 U.S. 162, 169, 59 L. Ed. 894, 899;

Guaranty Savings Bank vs. Bladow, 176 U.S. 448, 453; 44 L. Ed. 540, 542.

B.

The Court of Appeals erred in holding that the written statements of one Walker, who had entered the land in question in this case, saying that he could not prove his warrant to be valid and requesting that the entry be recognized and a patent be issued to Nikles for cash, were insufficient to support the subsequent cash sale to Nikles merely because the Land Office had not officially declared a cancellation of Walker's entry prior to the sale to Nikles, notwithstanding the fact that a relinquishment may be made by any unequivocal act, that Walker had made written request th t he be permitted to enter the land with cash in the name of John Nikles and the Land Office had Walker's relinquishment in its possession. Such holding conflicts with the applicable prior decisions of the United States Supreme Court in the following cases:

Moss vs. Dowman, 176 U.S. 413, 420, 421, 44 L. Ed. 526, 529 (1900);

Love vs. Flahive, 205 U.S. 195, 201, 202, 51 L. Ed. 768, 771 (1907);

Taylor's Lessee vs. Myers, 20 U.S. (7 Wheaton) 23, 25, 26, 5 L. Ed. 387, 388 (1822);

Keane vs. Brygger, 160 U.S. 276, 286, 287, 40 L. Ed. 426, 429, 430 (1895).

C.

The Court of Appeals erred in holding that, after the lapse of more than 100 years, there was no presumption which the government was under any obligation to overcome, and that the government was entitled to appropriate the land without furnishing any evidence to overcome a presumption of regularity and validity of the sale to Nikles. The above is sustained in the following cases:

United States vs. Fullard-Leo, 331 U.S. 256, 270, 271, 281; 91 L. Ed. 1474, 1484, 1485, 1490 (1947);

United States vs. Juan Chaves, 159 U.S. 452, 463, 464, 40 L. Ed. 215, 220 (1895);

United States vs. J. Francisco Chavez and Pueblo of Isleta, 175 U.S. 509, 520-523, 44 L. Ed. 255, 259, 260 (1899);

United States vs. M. R. Pendell, et al., 185 U.S. 189, 198-200, 46 L. Ed. 866, 871 (1901);

United States vs. Commonwealth, etc., 193 U.S. 651, 656; 48 L. Ed. 830, 832;

Galt vs. Galloway, 4 Peters 332; 7 L. Ed. 876, 880;

Northern Pacific Railroad Company vs. Amacher, 175 U.S. 514, 567; 44 L. Ed. 274, 275 (1900);

Holt vs. Murphy, 207 U.S. 407, 414; 52 L. Ed. 271, 273;

Lytle vs. Arkansas, 9 Howard 315, 331, 332; 13 L. Ed. 153, 160;

Atteberry vs. Blair, 244 Ill. 363, 370; 91 N.E. 475, 478 (1910).

D.

In cases involving the purchase of public land by settlers, the rule is that the Court should consider, even on appeal, newly discovered pertinent evidence, and the Court of Appeals erred in denying the petition for rehearing. This rule was applied in the following case:

El Paso Brick Co. vs. McKnight, 233 U.S. 250, 258, 58 L. Ed. 943, 948 (1914).

Questions Presented For Review

I.

The cancellation of Nikles' certificate by the Land Office without notice and without an opportunity to be heard was a nullity.

II.

The admission by Walker that he could not prove the validity of his warrant, coupled with his request that he be permitted to enter said tract of land with cash in the name of John Nikles, was sufficient to support the subsequent cash sale to Nikles.

III.

The fact that relinquishment of entries could properly be made in the local Land Office and the fact that the register and receiver of the local office accepted Nikles' entry and subsequently accepted his money and issued him a certificate, raises a presumption, after the lapse of many years, that the local office had received some form of relinquishment from Walker; and after the lapse of 100

years, the Court should presume that whatever was required to make Nikles' entry valid had been furnished.

IV.

The newly discovered evidence presented in the petition for rehearing was sufficient to require remandment to the trial court for further proceedings.

STATEMENT OF THE CASE

This suit involves the title to part of a quarter section of land and the easement of Appellant for its transmission line from its generating plant in the adjoining section on the bank of the Mississippi River.

On May 13, 1857, Hiram Walker of Springfield, Illinois, who held Military Bounty Warrant No. 37294, located it on the entire quarter section at the Land Office in that city. The warrant had been issued to Isabella Bowman.

It appears that Isabella Bowman had sold the warrant, assigned it in blank and delivered it to one George W. Raff, and that it was stolen from Raff at St. Louis, sold to Prim and Gibson of Springfield, Illinois, who sold it to Hiram Walker, an innocent purchaser.

The Land Office files contain a letter from Raff dated June 30, 1857, reporting that this warrant, with others, had been stolen from him at St. Louis. Raff filed suits in Ohio against Bowman and Walker and others and obtained judgments establishing his right and title to the stolen warrant, transcript of which decrees were filed in the Land Office.[1] He secured the issuance of a duplicate warrant which was located on land in Nebraska.

On September 5, 1859, the Land Office served upon Walker a notice[2] that upon a caveat dated June 30, 1857, the warrant No. 37294 had been suspended and that Walker was required to make proof of the validity of his claim of

1. Appendix "F" to this petition, Record Exhibit "G" to the Petition for Rehearing.
   Appendix "G" to this petition, Record Exhibit "J" to the Petition for Rehearing.
2. Appendix "H" to this petition, Record Exhibit "K" to the Petition for Rehearing.

title to it within ninety days. Walker did not make any claim of title. This quarter section was not very desirable. It had been for sale more than thirty years at a reduced price and no one wanted to buy it. Apparently Walker had made some arrangement with one John Nikles, a farmer, and Nikles moved onto the land as a settler, built himself a house and other improvements and cleared and cultivated at least part of it.

On February 4, 1860, Nikles made, before a Notary Public, the affidavit the law required of settlers to show their qualification to purchase such land.[3] On what date this was filed in the local Land Office, the available records do not show, but it appears that on February 22, 1860, the same man who had taken Nikles' affidavit, wrote the General Land Office in behalf of Walker and Nikles, as follows:

"Springfield, Ill.
February 22, 1860

Sir:

Mr. Hiram Walker has been informed through notice from your office bearing date 29 Aug. 59 that his location of Military Land Warrant No. 37294 for 160 acres act of 3 Mch. 55 has been suspended upon a caveat being filed vs the patents being issued to him. The caveat bearing date June 30, 57 coming from Geo. W. Raff of Stark Co., O.

Mr. Walker's location was made upon the Northeast ¼ of Section 13, in Township No. 10 South, Range No. 4 West, Third Principal Meridian in the Kaskaskia District Ill.

Now Mr. Walker is unable to furnish any evidence to your department which can support and vindicate the fairness or bonafide character of the assignments

3. Appendix "I" to this petition, Record Exhibit "E" to Appendix of Appellant's Brief in Court of Appeals.

under which he claims. He purchased said warrant from an innocent holder thereof, but is satisfied from facts that have since come to light that said warrant was stolen from the real owner before it came into the hands of the person from whom he purchased it.

He — Mr. Hiram Walker — now asks that he may be permitted to enter said tract of land with cash in the name of Mr. John Nikles, and that the officers of the local Land Office at this place be instructed to that effect.

Very respectfully yours
Your Obt. Ser.
S. C. Gibson

To the Hon.
Com. Gen. Land Office
Washington, D.C.'"[4]

Having received no answer to the above request, that the Springfield Land Office be instructed to permit a cash entry of the land in the name of John Nikles, Walker's agent wrote the Land Office again May 30, 1860, asking for a reply to the proposal.[5]

No answer having been obtained, Walker in person, on August 4, 1860, sent back to the Land Office the notice of September 5, 1859, which had been served on him[6] and with it this letter.

"I hereby declare my inability to produce any evidence in support and vindication of the bonafide character of the assignment under which I claim the title to land Warrant No. 37294 for 160 acres issued to

4. Record Exhibit "M" to the Petition for Rehearing.
5. Appendix "J" to this petition, Record Exhibit "N" to the Petition for Rehearing.
6. Appendix "H" to this petition, Record Exhibit "K" to the Petition for Rehearing.

Isabella Bowman and referred to in the attached notice or caveat.

Hiram Walker

Springfield, Ill.
August 4, 1860'"[7]

All the foregoing proceedings and transactions had occurred, and proof of all of them was in the hands of the government representatives, months before November, 1860.

On November 12, 1860, Nikles bought the land at the office in Springfield, Illinois, paid the Receiver the purchase price and got from the Receiver and the Register the usual and proper receipt and certificate[8] which entitled him to a patent on presentation to the General Land Office.

The duty and power to decide conflicts between entrymen's claims was vested in the Receiver and Register of the local Land Office and they were not limited with respect to the kind of evidence on which their action might be based.

The Department of Agriculture now claims the land. The basis for its claim is that the government's tract book bears a notation that Cert. No. 28954, which Nikles had received, was cancelled. There was no caveat or objection ever made to Nikles' purchase or certificate. If his certificate was cancelled, it was done without any notice to him and without any hearing or opportunity to be heard.

The proper place to file a withdrawal, relinquishment or cancellation of an entry was the local Land Office. The records of that office relating to Nikles' entry and purchase have not been found.

---

7. Record Exhibit "O" to the Petition for Rehearing.
8. Appendix "K" to this petition, Record Exhibit "G" to the Appendix of Appellant's Brief in Court of Appeals.

It appears that Nikles did not learn that his certificate had been cancelled until the Land Office wrote a letter to Nikles' agent, Gibson, telling him of the cancellation; and, on receiving that information, Nikles wrote the Land Office saying that when he entered the land Walker had already relinquished the prior entry and asking that his own entry be reinstated, which was as follows:

"Springfield, Illinois
June 20, ..62

Sir:

In reply to your letter of March 15, ..62, in which you inform me that the Entry of the Northeast Half of Section 13, Township 10 South, Range 4 West of the Third Principal Meridian, made by John Nikles November 12, ..60, for actual settlement had been cancelled because the same tract of land had been previously sold and embraced in location of Warrant No. 37294 Act of 55 made by Hiram Walker. I would respectfully submit Mr. Nikles is a poor man and is at present residing upon said land with his family and has made considerable improvements on the same and in consideration that he had already filed in your office Hiram Walker's relinquishment of all his right to said land by virtue of his location above mentioned together with his (Walker's) request that he (Mr. Nikles) might be permitted to enter the said tract of land he now respectfully asks if any objections exist why his entry of said land made on the 12th day of November, ..60, and subsequently cancelled should not now be reinstated and patented.

If Mr. Walker's relinquishment in favor of Mr. Nikles never reached your department, Mr. Nikles can obtain another and send to you forthwith.

I am very respectfully

S. C. Gibson

Hon. J. (?) Edmund
Washington, D.C.'"[9]

9. Record p. 24 of Appendix to Appellant's Brief in Court of Appeals.

In the meantime the Land Office had formally cancelled Walker's entry April 26, 1862. The Land Office did not reply to Nikles' request. The Government kept Nikles' money and Nikles and the succeeding owners continued to occupy, cultivate and improve the land without any question for one hundred years. The Appellant bought its easement in good faith and without any notice of any defect in the title and built the transmission line at a cost many times the value of the land it crosses.

The government's complaint alleged that the agents of the government had repeatedly attempted to get Central Illinois Public Service Company to apply for a permit to maintain the transmission line. That should not prejudice the Appellant. It probably discloses the actual primary and powerful reason and object for this suit, because taking the permit would give the governmental agency joint rights and control over properties of the entire transmission line and associated facilities from the generating station at Grand Tower, Illinois, on the western boundary of Illinois, to the Muddy substation about 25 miles from the eastern boundary of Illinois.[10]

Basis For Federal Jurisdiction in the Court of First Instance

The jurisdiction of the district court was invoked by the United States by filing its complaint on July 31, 1964, as provided by 28 U.S.C. sec. 1345. The jurisdiction of that Court rests upon 28 U.S.C. sec. 1291.

---

10. Title 36, Code of Federal Regulations, Ch. II, §251.52.

ARGUMENT

A.

The Commissioner cancelled Nikles' certificate arbitrarily without any notice or any opportunity to be heard. Such action was without jurisdiction and void and the court erred in giving it any force or effect.

The Government claims there are no outstanding rights under the sale to Nikles because some Land Office records show that the Commissioner cancelled Nikles certificate in 1860.

It is elementary that no tribunal, high or low, can destroy a man's rights without, in some manner, obtaining jurisdiction and permitting him to be heard. Not only is there no proof that Nikles was heard or given any chance to be heard, the records indicate that he did not even know of the cancellation until 1862 when his agent, still trying to get the patent, was so informed. Nikles then protested and pointed out that the prior entry had been relinquished and asked the Commissioner to reinstate his entry and certificate. Apparently the Land Office made no inquiry with respect to the relinquishment. Nikles' protest and request were ignored. If he had been permitted a hearing and failed to support his claim, he was in possession and qualified to make a new entry and there were no adverse claims. No adverse claim to the land has ever been made.

Nikles waited for the Land Office to act on his request. None came, but his possession was never disturbed and he and the succeeding owners did not complain or demand that the title be cleared.

The subsequent purchasers of this land were led to omit investigation and complaint by the fact that it is a

well established law in Illinois that a seller who contracts to deliver a merchantable title has complied with his contract in so far as it relates to conveyance of the title by the Government, if he shows the record of an entry. In a case involving the question, the Illinois Supreme Court said:

> "The entries showed the purchases from the U.S. beginning in 1819 and all of them more than 50 years ago, and the fact that the patents to which the purchasers were entitled had not been delivered to them would not cause any just apprehension as to the title in the mind of an ordinary prudent person." Attebery vs. Blair, 244 Ill. 363, 370; 91 N.E. 475, 478.

The foregoing decision has never been modified or overruled.

The cancellation of Nikles' certificate was made by the Land Office Commissioner. The authority to pass upon the conflicting claims of parties seeking to enter and purchase public lands was originally vested in the Receiver and the Register of the local Land Office and, until an amendment of the law made in 1836, their power was exclusive and their decision final. Without repealing the prior law, Congress passed an Act which provided that the executive duties pertaining to the sale of public lands and the issuing of patents should be subject to the supervision and control of the Commissioner of the General Land Office. 5 Stat. L. 107.

In a case before the Supreme Court in 1888, Mr. Justice Field stated the controlling facts as follows:

> "* * * In October 1857, an order was made by the Commissioner of the General Land Office, cancelling the entry of Davidson for the two tracts of land, on the alleged ground that one of them, not the tract embracing the premises in controversy, was included in a prior grant to the State, and therefore was not

subject to entry. The order of cancellation was made without previous notice of any kind to Davidson or any party in interest under the entry, and the purchase money paid was never returned or offered to him or to any of his successors in interest; and the defendant contends that the order was erroneously and improperly made. The Commissioner of the General Land Office afterwards came to the same conclusion, and in June, 1879, he directed the entry to be reinstated as to the tract which had not been previously granted to the State; that is, the tract in controversy in this case. It was between the cancellation and the reinstatement of the entry as to this tract that the homestead entry was made by Myron H. Puffer, and the patent issued to him. * * *"

Upon the facts outlined above, the Supreme Court held that the cancellation of the entry was improper and that such unauthorized treatment of the entrymen's rights would be corrected whenever the matter might come before the judiciary. The Court said:

"* * * The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. * * * But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. * * *" Cornelius vs. Kessel, 128 U.S. 456, 459, 461; 32 L. Ed 482, 483.

In April 1839, Thomas Lindsey, claiming a right of pre-

emption by reason of actual residence and cultivation, applied to the Receiver and Register of the local Land Office to purchase a quarter section of Illinois land and on June 3, 1839, having established his claim to the satisfaction of those officers, he paid for the land and was given the proper receipt and certificate. Sometime in 1845, David Hawes claimed a pre-emption right to the same land. On August 9, 1845, the Commissioner set aside the entry of Lindsey and directed the Receiver and Register of the local office to hear proof of the right of David Hawes and to adjudicate his claim. It was found that a second survey made in the autumn of 1844, showed that Lindsey's residence had been built outside the boundary line of the tract and for that reason the local officers issued to Hawes a certificate on which he obtained a patent March 1, 1848. In a suit by Lindsey's heirs, the Supreme Court held that the cancellation of Lindsey's certificate was illegal and awarded the land to Lindsey's heirs. The Court said:

> "The order for this new survey emanated from the Commissioner of the Land Office June 1st, 1844, and the survey was actually made in the autumn of that year, five years after Lindsey's entry, and five years also after his death, and there is no proof whatever that any of his heirs had notice of this survey, or of any intention on the part of the commissioners to set aside Lindsey's entry; but the whole proceeding was ex parte. * * * These heirs were not in any sense parties to any of the proceedings by which the title to the land which their ancestor had bought of the government was vested in David Hawes, and their claim annulled.
>
> "Under these circumstances, we have no hesitation in holding that the action of the officers of the Land Office was not conclusive upon their rights, and that a court of equity may inquire into the proceedings by which the title was vested in Hawes, and afford relief if a proper cause for it is shown to exist. That this

is the settled doctrine of this court, a reference to a few of its decisions will show. * * *" Lindsey vs. Hawes, 67 U.S. (Black) 554, 556, 557; 17 L. Ed. 265, 267.

The Act of May 28, 1839, (4 Stat. L. 420) required that prior to entry proof should be made to the Register and Receiver. The Court held that their decision was conclusive. Lytle vs. Arkansas, 50 U.S. (9 Howard) 314, 333; 13 L. Ed. 153, 160. The Act of July 4, 1836, (5 Stat. L. 107) made their action subject to control by the Commissioner. The Act of 1841 (5 Stat. L. 453) provided that "all questions as to the right of pre-emption arising between different settlers shall be settled by the Register and Receiver of the district within which the land is situated, subject to an appeal to and to revision by the Secretary of the Treasury of the United States." The same provision was carried into the Revised Statutes of 1873-74, Title XXXII, ch. 4, §2273. In 1895, the Court held that:

"* * * The grant of power to the local officers is not limited by the manner in which they exercise that power, and does not rest at all upon the kind of evidence upon which they act. Their adjudication must be final in all cases, or it is final in none. It was final when no supervising power was by statute vested in the Commissioner of the General Land Office. It ceased to be final when the general power of review and supervision of all 'executive duties' concerning the survey and sales of lands was vested in the higher officials of the Land Department at Washington. * * *

"Of course, this power of reviewing and setting aside the action of the local land officers is, as was decided in Cornelius vs. Kessel, 128 U.S. 456 [32:482], not arbitrary and unlimited. It does not prevent judicial inquiry. Johnson vs. Towsley, 80 U.S. 13 Wall. 72 [20:485]. The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he

cannot be arbitrarily dispossessed. His interest is subject to state taxation. Carroll vs. Safford, 44 U.S. 3 How. 441 [11:671]; Witherspoon vs. Duncan, 71 U.S. 4 Wall. 210 [18:339]. The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. * * *" Orchard vs. Alexander, 157 U.S. 372, 378, 383; 39 L. Ed. 737, 740, 741.

Pursuant to a railroad grant, the railroad company, in 1883, filed a selection which was rejected October 23, 1891, because defective. In 1888, one Svor homesteaded the land, occupied and cultivated it until he made a homestead entry in 1904. The railroad company filed a new selection six (6) days after final rejection of their first one. The second selection was approved in 1897 and the railroad then sold the land to one Morris, who bought with full notice and knowledge of the occupancy and claim of Svor. In obtaining title to the land under its second selection, the railroad had certified that the land was then "vacant and unappropriated". As a ground for denying Svor any relief, it was contended that he had delayed completion of his homestead entry beyond a statutory limitation. In answer to that contention, the Supreme Court said:

"* * * Whatever may have been the cause of the defendant's delay in so asserting his right, there is no suggestion that he either knew of or acquiesced in the representation that the land was vacant and unappropriated, or that he was in any wise apprised of the filing, pendency, or approval of the second selection until after the land had passed out of the jurisdiction of the Land Department by the certification under the land grant. In short, the proceeding was essentially ex parte, and he was neither heard nor given an opportunity to be heard.

"In these circumstances we think it is a necessary conclusion that the title acquired by Sage, trustee,

was held by him in trust for the defendant, and that it is now held upon a like trust by the plaintiff, who took with full notice and knowledge of the defendant's occupancy and claim. * * *'' Svor vs. Morris, 227 U.S. 524, 529; 57 L. Ed. 623, 626.

Even if it be conceded that, at this late date, the Land Department can question the rights of those who purchased in good faith, it is not entitled to take the land by virtue of an ex parte entry of a cancellation made by an official whose authority was to review actions of the local authorities, made without notice to anyone and without affording anyone a hearing even after the party affected had requested that the unauthorized act be rescinded. The Commissioner had no jurisdiction, whatever his authority, and as against the entryman and all others, the proper decision must be that their rights stand exactly as though no cancellation of Nikles' certificate had ever been attempted. Knapp vs. Alexander-Edgar Lumber Co., 227 U.S. 162, 169; 59 L. Ed. 894, 899. Guaranty Savings Bank vs. Bladow, 176 U.S. 448, 453; 44 L. Ed. 540, 542. The lower courts erred in giving any force or effect to the alleged cancellation.

B.

The Court erred in its conclusion that Walker's letters were not, as a matter of law, a relinquishment or withdrawal of his claim to the land.

The purported cancellation of Nikles' certificate was improper, not only for the reason that it was entered without jurisdiction, but also because it was based upon an incorrect interpretation of Walker's written relinquishment of his entry and his request that the government permit a cash entry in the name of John Nikles. Even after the statute was changed to give the Commissioner power to review the decision of the local Receiver and Register, all ques-

tions, in the event of a conflict and controversy with reference to pre-emption and purchases of public land and rights to certificates and patents, were required by the statute, 5 Stat. L. 453, to be submitted in the first instance to the officials of the local Land Office. If that had been done, the local office might have easily furnished good proof of Nikles' right to enter the land.

As declared by the Court in the case of Orchard vs. Alexander, 157 U.S. 372, 378, 39 L. Ed. 737, 740, the Receiver and Register, in adjudicating the controversy, were not restricted with respect to the manner in which they made their investigation or the kind of evidence upon which they should make their decision.

The date on which Nikles filed his first papers in the local Land Office is not shown by any record now available. Nikles made his affidavit before a land agent, S. C. Gibson, and Gibson was still acting as his agent two years later. The Land Office was at Springfield, Illinois. The Receiver, the Register, Walker and Gibson all resided in that city. Walker's relinquishment could regularly and properly have been made through the local office, and it would have been easy and convenient for him to do so. It could have been made in any form or manner which was acceptable to the local Land Office as proof that he was no longer making any claim to any personal rights under the entry which had been in controversy for about three years. It could have been made by act not of record and never certified in any way to either Land Office, even by acts in transactions having no relation to his attempted entry of the land.

In May, 1882, Edward H. Love settled on a half quarter section in Montana. In October, 1884, Michael Flahive settled upon the other half of said quarter section, built

a house thereon, and thereafter claimed the whole of the quarter section as his homestead. In the resulting litigation the Court ultimately found that Love had made a sale of the land after making his entry and before he had completed the occupation and cultivation required to entitle him to the land under the homestead laws. The attempted sale by Love was void under the provisions of the homestead law, but the Supreme Court held that it was sufficient evidence of a decision to relinquish his right of entry and give the land to Michael Flahive's widow. The fact that there was no formal relinquishment and the fact that no proof or record of the attempted sale had been filed in either the local Land Office or the General Land Office, either before or after Flahive's entry, was not deemed material. Love vs. Flahive, 205 U.S. 195, 201, 202, 51 L. Ed. 768, 771.

In a controversy relating to a tract of land which had been acquired by the State of Washington by selection under a government grant, it was contended that there had been a prior homestead entry of the land before the selection was made. One Holgate had entered the land before 1864. He executed and delivered a relinquishment in February, 1864. The selection by the State of Washington was made the following month. Holgate's relinquishment was not returned to or noted on the records of the Land Office until 1871 and his entry was not cancelled until December 20, 1871. The Court held that that "irregularity" did not affect the rights of the party claiming under the selection, saying:

> "* * * it is the policy of the government to protect the rights of the homestead claimant while he is endeavoring to comply with the requirements of the law; but when the government becomes satisfied that there has been an abandonment of such right by the applicant, the entry will be canceled, and the land will be

> subject to the re-entry of some one who will comply with the law, and that the question whether or not there has been an abandonment must be determined, like every other question of the kind, by evidence, * * *'' Keane vs. Brygger, 160 U.S. 276, 286, 287, 40 L. Ed. 426, 429, 430.

When the conflict is between private parties there may be at times no way to avoid use of arbitrary rules to resolve the controversy even though the result is a great misfortune to one or the other of the parties. But in this case, the Court is asked to give the property to the government on the ground that no relinquishment by Walker had been made on the records of the General Land Office before Nikles filed his first papers in the local office. The record does not show on what date those papers were filed, but in any case it has been decided that an entry, made by a settler in possession, before a prior entry had been released in either the local or in the General Land Office, would attach when the prior entry was relinquished.

Robert H. Doran entered a tract of land May 7, 1890. In September of that year Richard Dowman went on the land, then unoccupied, built a house and continued to live on the land until he had completed five years of occupancy. He made a formal homestead entry November 18, 1890. Carrie Moss obtained from Doran a relinquishment of his entry, and on October 24, 1890, filed it in the local land office and entered the land in her own name. Notwithstanding the fact that, by the rule commonly followed, Doran's entry segregated the land and Dowman's entry was made before the Doran entry was released in either land office, and Moss occupied part of the land and commenced improvements before her entry expired, the Supreme Court held that Dowman's premature entry attached the instant the relinquishment of the prior entry was filed

and gave him priority because he was a settler in good faith occupying the premises. Moss vs. Dowman, 176 U.S. 413, 420, 421; 44 L. Ed. 526, 529.

On the question of abandonment of entries, the Supreme Court instructed the Circuit Court as follows:

> "* * * An entry is forfeited, if not surveyed within a limited time. A survey is forfeited if not returned to the land-office by a specified time. In these cases, the right of abandonment is recognized. An individual may abandon his survey, by not returning it to the land-office within the time prescribed by law. Why may he not abandon it by any other unequivocal act? This is not prescribed as a single mode by which a right is to be exercised; * * *" Taylor's Lessee vs. Myers, 20 U.S. (7 Wheaton) 23, 25; 5 L. Ed. 387, 388.

In the present case, Nikles was a settler in good faith. He remained in possession continuously and was occupying the land when the prior entry was finally formally cancelled of record in the General Land Office. Walker requested that an entry in Nikles' name be allowed. Walker could not complain if that were done. The only other party concerned or affected would be the United States and it received from Nikles in cash a purchase price which no one else was willing to pay. Appellant believes that it is not fair to allow the Land Department to add to its millions of acres of forest preserves this strip of farm land merely because the records now available do not show a relinquishment to have been made one hundred years ago, and which could have been made by some unequivocal act, effective without any legal requirement that it be recorded.

C.

The United States was the plaintiff in this suit and the burden of proof was upon it, United States ys. Fullard-Leo, 133 F. 2d 743, 747. The lower courts erred in acting on

incomplete records without requiring plaintiff to meet the presumptions which the law raised under the circumstances.

In 1860, the duty and the authority to investigate and determine the qualifications of a settler seeking to pre-empt a tract of the public lands was vested in the officers of the local Land Office in the district in which the land was situated. The Springfield district included the entire State of Illinois. The officers of the local Land Office were not careless or irresponsible persons. They were capable and experienced men, accustomed to handling important matters. Prior to 1836, their decisions were final and conclusive. Orchard vs. Alexander, 157 U.S. 372, 376; 39 L. Ed. 737, 739.

The officers at Springfield had in their possession the record of the entry made by Walker in 1857. Walker lived in Springfield and when John Nikles appeared at the office and applied to pre-empt the same quarter section, it is to be presumed that those officials made some investigation and reached a proper conclusion as to what action was permissible under the circumstances. In addition to that, when Nikles appeared again at the Land Office in November and applied to purchase the land and offered to pay with cash, the officers were called upon to decide whether his money should be accepted and a certificate issued which would entitle him to a patent. More than eight months before that time, Walker had written a letter which is now in the files of the General Land Office in which he conceded that he did not have title to the warrant on which his entry had been based and in which he expressly requested that the Land Department permit an entry in the name of John Nikles.

By the Act of July 31, 1876, 19 Stat. L. 102, Par. 8, the land office at Springfield, Illinois, was abolished, the Secretary of the Interior was authorized to transfer to

the State of Illinois such of the transcripts, documents and records of the office as might not be required for use of the United States. This petitioner has been unable to find any of those records.

That the power to adjudge whether an entryman had qualified and had complied with the requirements of the statutes with respect to occupation, cultivation, etc. was vested and complete in the receiver and the register of the local land office, is also shown by the statutory provision that, before entries be made, proof of settlement and improvement must be made to the satisfaction of the register and receiver of the land district in which the lands lie and by the instructions to the receivers and registers that the facts "* * * must be established by the affidavit of the occupant, supported by such corroborative testimony which may be entirely satisfactory to both * * *". Subsequently, the Commissioner issued another direction that, when the entryman was unable to make proper proof because the plats of the government survey were not yet available in the local land office, the receiver and register were to keep a proper list of such cases and no payments, however, were to be received on account of pre-emption rights in such cases until they received further instructions. Lytle vs. Arkansas, 9 Howard 315, 331, 332; 13 L. Ed. 153, 160.

By the Act of May 14, 1880, 21 Stat. L. 140; USC Title 43, ch. 7, §202, it was provided that when a pre-emption claimant should file a written relinquishment of his claim in the Local Land Office, the land covered by such claim should be held as open to settlement and entry without further action on the part of the Commissioner. That statute indicates that as late as 1880, the Local Land Office was the regular and proper place in which to file relinquishments and that, if Walker had never sent any

communication to the General Land Office, that fact would not indicate that a proper relinquishment had not been presented at the local office.

Inasmuch as the arbitrary cancellation of Nikles' certificate in December 1860, by the Washington Land Office was void for lack of jurisdiction, the action of the officers in issuing a certificate of purchase to Nikles is the last official governmental action until the institution of this suit, and it should be presumed that those officers did not accept the settler's money and issue him a certificate without considering the record and concluding that it was not only right but that it was their duty to do so. Failure to recognize and give effect to a presumption of validity with respect to their action, necessarily involves a presumption that those officials, with the record of a prior entry by a resident of their city before them, violated their oaths of office and sold a quarter section of the government's land to a settler from whose heirs or grantees the government would retake it, without compensation, more than 100 years later.

The rule requiring the courts to recognize presumptions under such circumstances, has been repeatedly recognized and applied by the Supreme Court. In a case in which, after cancellation of a settler's entry, application was made for refund of the purchase price, the government contended that the applicant had not complied with the provisions of the statute with respect to the surrender of the settler's receipt. The Supreme Court said:

> "* * * There is a finding, however, that the Secretary of the Interior ordered repayment 'on the relinquishment by the claimants of all claim to the land so canceled,' and a further finding that the relinquishment was made 'as required by the rules and regulations of the Land Office.'
>
> "We must presume that the Secretary did his duty

and exacted the performance of all the statute required, and infer, therefore, that he had received the duplicate receipt, and all that was necessary to fulfil the conditions of the statute and revest the title in the United States to the land canceled." United States vs. Commonwealth, etc., 193 U.S. 651, 656; 48 L. Ed. 830, 832.

In a case involving relinquishment of an entry prior to 1830, the Supreme Court said:

"* * * An entry, or the withdrawal of an entry, is in fact made by the principal surveyor at the instance of the person who controls the warrant. It is not to be presumed that this officer would place upon his records any statement which affected the rights of others at the instance of an individual who had no authority to act in the case. The facts, therefore, proved by these records, must be received as prima facie evidence of the right of the person at whose instance they were recorded, and as conclusive in regard to such things as the law requires to be recorded. * * *" Galt vs. Galloway, 4 Peters 332, 343; 7 L. Ed. 876, 880.

The receiver and register, having been constituted by statute the tribunal to determine the facts and adjudicate with respect to the rights of those who claimed preemptions, (Lytle vs. Arkansas, 9 Howard 315, 333; 13 L. Ed. 153, 160) and there being no requirement that any formal or official record of the evidence submitted to them or of their opinion or decision thereon, there was presented a typical case for the application of a presumption that their conclusion was properly and sufficiently supported by the facts and whatever the law required to be done had been done and that their action in the matter was regular and valid.

Further evidence of the authority of the officers of the local Land Office and the weight accorded to their decisions is the declaration of the Secretary of the Interior that

"in order that this important matter of regulation may be perfectly clear, it is directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office." Holt vs. Murphy, 207 U.S. 407, 414; 52 L. Ed. 271, 273. The foregoing shows again that relinquishments of entries were to be made in the local Land Office.

Appellant contends that the lower courts should have ignored the invalid cancellation endorsed upon the land office record of Nikles' entry and should have required plaintiff to furnish some convincing proof that proper evidence of a relinquishment by Walker had not, prior to acceptance of Nikles' entry, been supplied to the officials of the local Land Office where the law required such withdrawals to be made.

In addition to the errors committed by the lower courts, with respect to relinquishment in the local Land Office, the courts also erred in refusing to recognize and apply the doctrine of ancient or lost documents and in not giving effect to the presumption that under the circumstances in this case, there had actually been some form of effective grant and conveyance, the record of which had become lost.

The rule that, after the passage of many years, conveyances will be presumed, is one of necessity growing out of the fact that in the course of time "the memory of man runneth not to the contrary" and the fact that records are so often lost or destroyed by floods, fire, wars or other casualties. The rule is not a statute of limitations and it runs against the public and against political subdivisions, states and nations.

The rule has been applied repeatedly against claims

made by the United States. United States vs. Chaves, 159 U.S. 452, 464; 40 L. Ed. 215, 220; United States vs. Chavez, 175 U.S. 509, 520, 522, 523; 44 L. Ed. 255, 259, 260; United States vs. Pendell, 185 U.S. 189, 198, 200; 46 L. Ed. 866, 871. In the latter case, the question arose whether the presumption extended, not alone to the existence of a proper and valid grant, but to its proper record, etc. The Supreme Court said:

> "We think it is, and that the evidence is sufficient not only to presume a grant, but to presume any other matter which would have occurred in order to render the grant a perfectly valid one and the evidence of it sufficient. * * *"

The Supreme Court recognized and applied the rule in a case decided at the October 1946 term. The United States attempted to appropriate a small island in the Pacific Ocean more than one thousand miles from Hawaii which, in 1862, was the property of the Hawaiian government. There was no record of any grant, conveyance or patent by the Hawaiian government or by the United States, but the evidence taken in the case showed that in February 26, 1862, Z. Bent and Johnson Wilkinson requested the Hawaiian government to take possession of the little island and annex it to the Hawaiian Kingdom, which request was complied with. Five men were left on the island but it did not appear how long they remained there. There were some conveyances but nothing further occurred until 1885, when the Pacific Navigation Company purchased the island and occupied it for about a year, after which the island was vacant until about 1913. In 1920, another settlement was attempted which lasted about one year. In 1922, the Fullard-Leos bought it but they visited it only twice, once in 1924 for twelve days and again in 1935 for one day. The United States Cir-

cuit Court of Appeals in 1947, entered judgment against the United States. The Supreme Court issued a writ of certiorari and on May 12, 1947, affirmed the action of the Court of Appeals. The Supreme Court said:

> "The presumption of a lost grant to land has received recognition as an appropriate means to quiet long possession. It recognizes that lapse of time may cure the neglect or failure to secure the proper muniments of title, even though the lost grant may not have been in fact executed. * * *"

The Court cited with approval several other decisions to the effect that, upon a long and uninterrupted possession, the law bases presumptions as sufficient for legal judgment, in the absence of rebutting circumstances, as formal instruments or records or articulate testimony and quoted from its earlier opinion in the case of United States vs. Chaves, 159 U.S. 452; 40 L. Ed. 215, as follows:

> "'Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and that such rule will be applied as a presumptio juris et de jure, wherever, by possibility, a right may be acquired in 'any manner known to the law'."

It had been argued that the possession and occupation of the island in question had not been actual nor continuous because there were periods as long as twenty-three years during which the island was unoccupied and had not even been visited by those who are claiming to be owners. The answer of the Court was

> "This is the rule. But, as we have indicated above, uninterrupted and long continued possession does not require a constant, actual occupancy where the char-

acter of the property does not lend itself to such use. No other private owner claims any rights in Palmyra. From the evidence of title and possession shown in this record, we cannot say that the decrees below are incorrect. * * *'' United States vs. Fullard-Leo, 331 U.S. 256, 270, 271, 281; 91 L. Ed. 1474, 1484, 1485, 1490.

The facts in the present case raise a much stronger presumption than was deemed sufficient in the Fullard-Leo case above mentioned. John Nikles' entry into possession of the land was definitely established. He was continuously in possession until 1862, when he protested the cancellation of his certificate. All of the evidence in the case indicates that Nikles and those who succeeded to his possession and title, continuously farmed the land and they were still farming it when the agents of the government demanded possession. The Appellant's transmission line was constructed years ago. No one, not even the United States Government, asserted any right or claim to the land at any time from 1862 until 1963. Under the circumstances, equity or justice does not require that the owners produce record proof of transactions occurring more than 100 years ago, some of which were never required to be recorded and the remainder would have been evidenced only by records in the offices of the government agencies which the owners of the property had no means of controlling or preserving.

The only record which the United States furnished to the court in this case was a copy of a page from a tract book from the Bureau of Land Management noting the purchase of the land by John Nikles in November, 1860, and bearing the notation ''canceled''. In addition to that, the government's representatives filed in court their affidavit that they did not have sufficient information to be

able to admit the genuineness of certified copies of a number of documents found in the files of the General Land Office.

In a case involving the right of a settler, the Supreme Court said:

> "It was long ago said by this court that 'the policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchaser of a limited extent of land, comprehending their improvements over that of any other person.'" Northern Pacific Railroad Company vs. Amacker, 175 U.S. 514, 567; 44 L. Ed. 274, 275.

It is suggested that the lower courts should have borne in mind that possession of this land with equitable title and undisturbed exclusive possession and use of the property was all that the settler and the successive owners needed for their purposes; that it is an agency of the government which began this litigation; that the owners of the land were not seeking to cut-off the rights of any other claimants, and that the burden of proof should not be thrown on them.

D.

The Court of Appeals erred in refusing to grant a rehearing when Appellant discovered the written relinquishment of Walker, which previously could not be found, and presented it, with other newly discovered evidence, to the Court of Appeals by means of a petition for rehearing, which was the only method then open.

With reference to the well established rule that the settler is the one for whose benefit the pre-emption laws were enacted. The Supreme Court has said:

> "* * * Again and again has this court affirmed the proposition that the settler is the beneficiary of the

pre-emption and homestead laws of the United States. In Lytle v. Arkansas, 9 How. 314, 333, 13 L. ed. 153, 161, it was said: '* * * The adventurous pioneer, who is found in advance of our settlements, encounters many hardships and not infrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed 160 acres. That this is the national feeling is shown by the course of legislation for many years.' * * *'' Moss vs. Dowman, 176 U.S. 413, 418; 44 L. Ed. 526, 528.

In a case which involved rights under a certificate issued to an entryman, the Supreme Court said:

''* * * The United States does not act as an ordinary proprietor seeking to sell real estate at the highest possible price, but offers it on liberal terms to encourage the citizen and to develop the country. A government does not deal at arms length with the settler or locater, and whenever it appears that there has been a compliance with the substantial requirements of the law, irregularities are waived or permission is given, even on appeal, to cure them by supplemental proof.'' El Paso Brick Co. vs. McKnight, 233 U.S. 250, 258; 58 L. Ed. 943, 948.

It was upon the ground that no relinquishment by Walker, had been proven, that the judgment of the lower courts had been based and under the rule laid down in the El Paso Brick case and similar decisions, Appellant was entitled to a hearing, and the Court of Appeals should have granted a rehearing or modified its prior decision to the extent of remanding the case to the trial court.

The Plaintiff in this suit included in its complaint allegations that the government's agents had repeatedly

requested the Defendant to make application for a permit from Plaintiff authorizing it to make continued use of the easement across the half-quarter section involved in this case and that the Defendant continued to refuse to apply for such permit. Those allegations had nothing to do with the question of Defendant's right to the easement and should have been disregarded, but the trial court pointed out those allegations in its opinion and conclusions of Law. The offer should not prejudice or impair the Appellant's defense in this suit, for the offer was not unconditional and if the bait had been accepted by Appellant, the effect would have been to give the Government Agency a right to joint control and use, not only of that part of the transmission line upon the property involved in this suit, but upon the entire transmission line from one end to the other. Title 36, Code of Federal Regulations, Ch. II, Sec. 251.52. If the government agency was offering to give Appellant the same easement and rights to which it was entitled under its grant of easement, what reason could there be for bringing a suit to cut-off those rights in the first instance? The offer discloses the real purpose of the governmental agency in instituting this litigation and it is respectfully submitted that the Justice Department and the Courts of the United States should not, in equity or fairness, be used to help accomplish such purpose.

Respectfully submitted,

ELMER NAFZIGER,
916 Illinois Building,
Springfield, Illinois,
Attorney for Appellant.

GRAY HERNDON,
W. KNOWLES LAIRD,
916 Illinois Building,
Springfield, Illinois

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

No. 15451 — September Term, 1965 — April Session, 1966

United States of America, Plaintiff-Appellee, vs. Central Illinois Public Service Company, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Illinois, Eastern Division.

June 29, 1966

Before HASTINGS, *Chief Judge*, KILEY, and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* The defendant, Central Illinois Public Service Company, appeals from an order of the district court granting a motion for summary judgment by the plaintiff, United States of America, in an action to vacate a strip of land adjoining the south boundary of the Shawnee National Forest upon which the defendant maintains electric power transmission lines.[1]

1. The land in question is a strip approximately one hundred feet wide and twenty chains long adjoining the south boundary of the southwest quarter of the northeast quarter, section thirteen, township ten south, range four west, Jackson County, Illinois.

The defendant asserts its claim to maintain its power lines on this land by virtue of mesne conveyances from John Nikles, who entered the land, allegedly a part of the public domain, on February 4, 1860 and later received a certificate entitling him to a patent. The official records of the Bureau of Land Management of the Department of the Interior, however, show that on May 13, 1857 a prior entryman, Hiram Walker, entered the land as the assignee of a military warrant for bounty land issued to Isabella Bowman. Walker's warrant was cancelled on April 26, 1862 after it was discovered that it had been stolen from its original owner some time earlier. In the meantime, on December 27, 1860, the certificate issued to Nikles was cancelled because it was in conflict with the earlier Walker entry. Nikles continued in possession despite the cancellation. The land was later included within the territory described in a presidential proclamation in 1939 which set aside "all lands of the United States within the areas . . . described" for the Shawnee National Forest.

An entry on public land which is prima facie valid, even though subsequently declared void, segregates the land from the public domain and prevents a second entryman from obtaining any interest in it until the prior entry has been set aside. *McMichael v. Murphy,* 197 U.S. 304, 311 (1905). Since the Walker entry was still a matter of official record, Nikles acquired no interest in the land and his certificate was properly cancelled. *Cornelius v. Kessel,* 128 U.S. 456, 461 (1888). Further, there is no evidence to establish a relinquishment by Walker at the time of Nikles' entry. A letter sent by Walker on August 4, 1860, in reply to an inquiry by the General Land Office, acknowledging Walker's inability to support the bona fide character of the assignment under which he claimed the land cannot be considered a relinquishment and was not so considered

by the Land Office. Thus the land was at all times owned by the United States and became part of the Shawnee National Forest by presidential proclamation.

The judgment of the district court is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

In the

United States Court of Appeals

For the Seventh Circuit

No. 15451

United States of America, Plaintiff-Appellee, vs. Central Illinois Public Service Company, Defendant-Appellant.	Appeal from the District Court of the United States for the Eastern District of Illinois, Eastern Division.

HON. WILLIAM G. JUERGENS, *Judge of said Court*

DEFENDANT-APPELLANT'S PETITION FOR REHEARING

Now comes Defendant-Appellant Central Illinois Public Service Company by its undersigned attorneys and moves the Court to grant a rehearing and a reconsideration of this cause for the following reasons:

1. *Because of Newly Discovered Evidence.*

Defendant-Appellant, since the rendering by the Court of its opinion in this case, has discovered documents which establish that Hiram Walker requested the Commissioner of the General Land Office that he be permitted to enter the Northeast Quarter of Section Thirteen (13),

Township Ten (10) South, Range Four (4) West of the Third Principal Meridian, Jackson County, Illinois, with cash in the name of Mr. John Nikles and that the officers of the local land office at Springfield, Illinois, be instructed to that effect. Copy of the letter containing this request together with documents setting forth the facts and circumstances preceding and following said request all of which except the one marked Exhibit "O" have been discovered since the rendering of the Court's opinion in this case. Said documents are hereinafter referred to by the following subparagraphs which are lettered to correspond with the lettered exhibits of said documents attached hereto and made a part hereof:

A. On June 3, 1857, George W. Raff made his written caveat and filed it with the General Land Office showing that land warrant number 37294, among other warrants, was stolen from him in St. Louis, Missouri. (See Exhibit "A");

B. On June 30, 1857, George W. Raff wrote to the Land Commissioner, Thomas A. Hendricks, asserting among other things, that military bounty warrant number 37294 was stolen from him on April 26, 1857, and sold by Edward Anderson of Chester, Illinois, to Primm & Gibson; that Primm & Gibson sold the warrant on May 1, 1857 to Haskell & Company of St. Louis, Missouri. Subsequently the warrant was returned to Primm & Gibson who sold it to Hiram Walker of Springfield, Illinois. Hiram Walker located land under the warrant. (See Exhibit "B");

C. On June 30, 1857, George W. Raff made a deposition before a Justice of the Peace in Stark County, Ohio, showing: (1) the purchase of military bounty land warrant number 37294 from Isabella Bowman; (2) the theft of the warrant from him on April 26, 1857. The deposition

together with the depositions of John W. Gibbs, John Lahm and Julius Whiting were filed in the General Land Office with George W. Raff's prayer for reissue of the lost warrant. (See Exhibit "C");

D. On January 26, 1858, George W. Raff published a notice of warning of the theft of the warrant numbered 37294 in the Missouri Democrat. (See Exhibit "D");

E. On February 5, 1858, George W. Raff filed in the Office of the Commissioner of Pensions whose records were later transferred to Veterans Administration an affidavit made by him on the 15th day of January, 1858, showing: (1) that Isabella Bowman assigned military bounty warrant number 37294 to him; (2) that he had the warrant in his possession and left his home in Canton, Ohio, to go to Omaha City in the territory of Nebraska; (3) that he arrived at St. Louis, Missouri, on the morning of April 23, 1857, and immediately took passage upon the steamer Minnehaha; (4) George W. Raff arose from his berth and passed into the barber shop, or washroom, leaving the said warrant in his stateroom in a pocket book; (5) that George W. Raff is confident the warrant was stolen during his absence in the washroom; and (6) that a search was subsequently made on the boat among the crew, waiters and passengers, but no clue to the loss of the warrant was discovered. (See Exhibit "E");

F. On February 6, 1858, Jos. C. Wilson, acting Commissioner of the land office wrote to George C. Whiting, Commissioner of the Pension Department, that a caveat had been filed by George W. Raff to arrest the issue of patents on locations made on, among others, military bounty warrant number 37294 issued to Isabella Bowman. (See Exhibit "F");

G. and H. On February 28, 1859, the Court of Common

Pleas in the County of Stark, State of Ohio, entered a final judgment in the said case of Raff vs. Bowman finding that: (1) military land warrant number 37294 was assigned to George W. Raff by Isabella Bowman; (2) the warrant was stolen from Raff on April 26, 1857, at St. Louis, Missouri; and (3) such proceedings were had that a duplicate of said land warrant number 37294 was issued to Isabella Bowman and delivered to George W. Raff but Isabella Bowman died before completing the assignment. The court then decreed that George W. Raff is the equitable owner of warrant number 37294 and is entitled to make an assignment of it as fully as though it had been assigned to him before said Isabella's death. Subsequently on July 11, 1860, John Whitacre delivered the said warrant number 37294 to the register and receiver of the local land office at Omaha, Nebraska, and located on Nebraska land. All of the above was duly certified and transcribed to the General Land Office. (See Exhibits "G" and "H");

I. On July 12, 1858, George C. Whiting, Commissioner of the Pension Office, wrote to the Honorable T. A. Hendricks, Commissioner of the General Land Offices, that satisfactory proof of loss of warrant number 37294 issued in the name of Isabella Bowman, and other warrants, had been made and he had granted duplicate warrants. (See Exhibit "I");

J. On October 10, 1859, George W. Raff as Plaintiff, filed a petition against Hiram Walker in the Court of Common Pleas, County of Stark, State of Ohio and afterwards on the 9th day of December, 1859, the Court entered a decree finding that: (1) Defendant, Hiram Walker, was legally notified of the pending cause and defaulted; (2) George W. Raff purchased military warrant number

37294 from Isabella Bowman on the 2nd day of September, 1856; (3) the said warrant on the 26th day of April, 1857, was stolen from George W. Raff at St. Louis, Missouri; (4) Raff never assigned the warrant and is the legal and equitable owner thereof; (5) a duplicate warrant was issued by the Pension Office and delivered to George W. Raff who subsequently assigned it to another party; and (6) Hiram Walker claims the original warrant but that said Hiram Walker or some other person for him unlawfully, without authority and in fraud of the rights of said Raff inserted the name of Hiram Walker in the original assignment and that Hiram Walker has no legal claim to said warrant. The Court thereupon adjudged the title in warrant number 37294 to be in George W. Raff subject to the rights of said Raff's assignee of the duplicate and forever enjoined Hiram Walker or his assigns from selling, assigning, or locating or in any manner disposing of said warrant. All of the above was duly certified and transcribed to the General Land Office. (See Exhibit "J");

K. On August 29, 1859, a notice was addressed to Hiram Walker, Sangamon County, Illinois, signed by Jos. C. Wilson, acting Commissioner of the General Land Office, advising Hiram Walker that: (1) land warrant number 37294 issued to Isabella Bowman located in the name of Hiram Walker at the land office of Springfield, Illinois, has been returned to the General Land Office; (2) upon a caveat of June 30, 1857, from George W. Raff, Stark County, Ohio, the warrant is suspended; and (3) the object of this notice is to call upon Hiram Walker to produce without delay such evidence as may be in his power to present in support and vindication of the fairness and bona fide character of the assignment under which he claims. Hiram Walker was given 90 days from

the receipt of the notice to produce his evidence and was notified that upon default, the General Land Office will feel at liberty to take final action in the case in favor of the party who shall be recognized as the actual owner of the warrant. (See Exhibit "K");

L. On September 5, 1859, William E. Keefer, Springfield, Illinois, Land Office Register, certifies that he has personally served the above notice, Exhibit "K", on Hiram Walker. (See Exhibit "L");

M. On February 22, 1860, S.C. Gibson, writing for Hiram Walker, acknowledged receipt of the notice of August 29, 1859, (Exhibit "K"), to the effect that his location under warrant number 37294 had been suspended upon the caveat from George W. Raff. Hiram Walker then through said Gibson asserted,

> "Now Mr. Walker is unable to furnish any evidence to your Department which can support and vindicate the fairness or bona fide character of the assignment under which he claims. He purchased said warrant from an innocent holder thereof but is satisfied from facts that has since come to light that said warrant was stolen from the real owner before it came into the hands of the person from whom he purchased it.
>
> "He, Mr. Hiram Walker, now asks that he may be permitted to enter said tract of land with cash in the name of Mr. John Nikles and that the officers of the local land office at this place be instructed to that effect." (See Exhibit "M");

N. On May 30, 1860, S. C. Gibson wrote again on behalf of Hiram Walker to the General Land Office stating that Mr. Walker is anxious for a reply to the letter of February 22, 1860. (See Exhibit "N");

O. On the 4th day of August, 1860, Hiram Walker con-

firmed what S. C. Gibson said in his behalf in the letter of February 22, 1860 (Exhibit "M"), by saying:

> "I hereby declare myself unable to produce any evidence in support and vindication of bona fide character of the assignment under which I claim the title to land warrant number 37294". (See Exhibit "O") NOTE: This is the same letter of Hiram Walker which was quoted in Defendant's answer in the trial court and referred to in the Defendant's original brief but is repeated here because it now appears it was merely a letter confirming the letter of February 22, 1860, written by Walker's agent, S. C. Gibson.

United States Statutes in force on June 23, 1860, provided as follows:

> "Whenever it appears that any certificate or warrant, issued in pursuance of any law granting bounty-land, has been lost or destroyed, whether the same has been sold and assigned by the warrantee or not, the Secretary of the Interior is required to cause a new certificate or warrant of like tenor to be issued in lieu thereof; which new certificate or warrant may be assigned, located, and patented in like manner as other certificates or warrants for bountyland are now authorized by law to be assigned, located, and patented; and in all cases where warrants have been, or may be, re-issued, the original warrant, in whoseever hands it may be, shall be deemed and held to be null and void, and the assignment thereof, if any there be, fraudulent; and no patent shall ever issue for any land located therewith, unless such presumption of fraud in the assignment be removed by due proof that the same was executed by the warrantee in good faith and for a valuable consideration."
>
> Volume 12 United States Statutes at Large, Page 90, Chapter CCIII, approved June 23, 1860; Second Edition, Revised Statutes of The United States, 1873-74, Title XXXII, Chapter 10, Page 447, Section 2441;

P. On July 29, 1935, A. E. Donhan, acting Assistant Commissioner of the General Land Office, wrote to Victor E. Furman, Title Attorney for the Department of Agriculture, explaining how the present owner of part of the Northeast Quarter, Section Thirteen (13), Township Ten (10) South, Range Four (4) West of the Third Principal Meridian (the John Nikles land) could be patented. (See Exhibit "P");

Q. On November 20, 1946, the East half of the Northeast Quarter of Section Thirteen (13), Township Ten (10) South, Range Four (4) West (part of the John Nikles land) was patented to Lucy Brown under the Color of Title Act. (See Exhibit "Q").

It can be seen from the above that Hiram Walker had been directed by the Acting Commissioner of the General Land Office on August 29, 1859 to produce within 90 days proof of the bona fide character of his claim on penalty of an adverse decision if he did not respond in 90 days. It was plain under the Statutes of the United States in force that where a patent has become lost and a duplicate issued as in the case of bar the original patent (under which Walker claims) is null and void and any assignment is fraudulent unless the presumption of fraud is removed by due proof. Volume 12 of United States Statutes at Large, Page 90 (quoted above). Not only did Hiram Walker fail to produce evidence to overcome the presumption of fraud, but he actually admitted in the letter written by his agent, S. C. Gibson, that in view of evidence that had come to light the warrant under which he claimed had been stolen from the true owner. (See Exhibit "M") In addition, Walker asked that the claim of John Nikles be honored. It was because of this withdrawal and abandonment of his claim by Hiram Walker on February 22,

1860 (See Exhibit "M") confirmed by a further letter of May 30, 1860 (See Exhibit "N") that the land in question was sold by the land office for cash on November 12, 1860. Hiram Walker's abandonment and withdrawal of his claim and his request that the claim of John Nikles be honored returned the land to the public domain and made it available for sale to John Nikles on November 12, 1860.

2. *Because of mistakes of fact which the Court made in considering the evidence.*

3. *Because of errors in the interpretation and application of the law into which the Court was led by its misunderstanding of the facts.*

4. *Because of errors of law apparent upon the face of the record.*

Accordingly Defendant respectfully requests this honorable Court to rehear and reconsider the above cause or to remand the cause to the District Court for the taking of further evidence.

Plaintiff requests an opportunity to answer this petition and Defendant agrees.

Respectfully submitted,

W. KNOWLES LAIRD
ELMER NAFZIGER
KENNETH H. OTTEN
916 Illinois Building
Springfield, Illinois

JOSEPH R. LOWERY
ROBERT BRODERICK
322 First National Bank Building
East St. Louis, Illinois

Attorneys for Defendant-Appellant,
Central Illinois Public Service Co.

APPENDIX "C"

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Wednesday, September 7, 1966

Before HON. JOHN S. HASTINGS, *Chief Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*

No. 15451

United States of America, Plaintiff-Appellee, vs. Central Illinois Public Service Company, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Illinois.

IT IS ORDERED by the Court that the petition for a rehearing of this cause, filed by the defendant-appellant herein, be, and the same is hereby DENIED.

APPENDIX "D"

Opinion, Findings of Fact and Conclusions of Law of the Trial Court

This proceeding is brought by the United States of America to require the defendant to vacate a part of the Southwest Quarter of the Northeast Quarter, Section Thirteen (13), Township Ten (10) South, Range Four (4) West, in Jackson County, Illinois, more particularly described as a strip approximately one hundred feet (100') in width and approximately twenty (20) chains in length, extending along and adjoining the south boundary thereof. Plaintiff prays that the Court require defendant to vacate said land and to remove therefrom its electric power transmission line, including all poles, wires and other property and equipment placed thereon by the defendant; that the plaintiff recover from the defendant the sum of $500.00 as damages for occupation and use of the premises and that the defendant be enjoined from further occupying or using said premises, except as may be authorized by plaintiff.

Generally stated, the complaint alleges that the plaintiff, United States of America, acting through the Forest Service of the Department of Agriculture, maintains a national forest in Jackson County, Illinois, known as the Shawnee National Forest; that the defendant is a corporation organized under the laws of the State of Illinois with its principal office and place of business in Springfield, Illinois, and is engaged in the generation and distribution of electric power; that the tract of land in question is now and at all times heretofore has been the property of the plaintiff, the same being unpatented and undisposed of public land of the United States of America as shown by

the official records of the Bureau of Land Management of the Department of the Interior, Washington, D.C.; that the described land is situate within the Shawnee National Forest and by virtue of Presidential Proclamation number 2357, dated September 6, 1939, was reserved from all forms of public entry and was set aside to become and be a part of the Shawnee National Forest and to be administered in accordance with the regulations of the Secretary of Agriculture pertaining to the national forests; that the defendant, without authority, is occupying a part of said tract, has cut timber therefrom and has erected and is operating and maintaining an electric power transmission line over, through and across the same; that defendant has been informed by officers and agents of the plaintiff that the occupancy and use of plaintiff's land, in the absence of proper authorization, is unauthorized and unlawful and that an application for and the obtainment of a permit from plaintiff authorizing the occupancy and use would be required for continuation thereof; that defendant failed and refused to apply for such a permit after having been twice requested to do so and that defendant has continued to refuse to apply for such permit; that plaintiff has no other adequate remedy except recourse to the Court.

Defendant filed its motion for summary judgment but failed to comply with the requirements of the rules of the United States District Court for the Eastern District of Illinois and its motion was stricken for failure to comply with the rules. Thereafter, plaintiff filed its motion for summary judgment upon the grounds that there is no genuine issue as to any material facts and that the plaintiff is entitled to judgment in its favor as a matter of law. Subsequently, defendant filed its motion for leave to renew motion for summary judgment.

Both parties have presented documentary evidence in support of their motions.

Defendant, Illinois Public Service Company, claims its right, title and interest in and to a part of the disputed land by virtue of mesne conveyances from one John Nikles.

The undisputed facts are as follows: On August 16, 1856, a warranty for bounty land, No. 37294, was issued by the Department of Interior, Office of Commissioner of Pensions, of the United States of America, to Isabella Bowman, entitling her to 160 acres of any land offered for public sale.

On May 13, 1857, one Hiram Walker, as assignee of Isabella Bowman, made application to locate the land in question pursuant to authority of the warrant.

On August 29, 1859, a notice or caveat was sent to Hiram Walker by the General Land Office, which is as follows:

> "General Land Office — Notice — August 29, 1859, Claim of Raff
>
> . . . the issue of a patent to you as assignee of Isabella Bowman, the warrantee, is suspended, and the object of this is to call upon you to produce without delay such evidence as it may be in your power to present in support and vindication of the fairness and bona fide character of the assignment under which you claim.
>
> Ninety days to reply.
>
> (Signature not legible.)
> Acting Commissioner."

On February 4, 1860, one John Nikles filed his Affidavit for Actual Settlement and Cultivation and entered the land in question.

On August 4, 1860, Hiram Walker replied to the notice

or caveat sent him by the General Land Office on August 29, 1859, as follows:

"'August 4, 1860

I hereby declare myself unable to produce any evidence in support and vindication of the bona fide character of the assignment under which I claim the land to Land Warrant No. 37294 for 160 acres issued to Isabella Bowman and referred to in the attached notice or caveat.

Hiram Walker.''

On November 12, 1860, John Nikles paid to the Land Office at Springfield, Illinois, the sum of $20.00 in full payment for the Northeast Quarter of Section Thirteen (13), Township Ten (10) South, Range Four (4) West of the Third Principal Meridian and received a certificate entitling him to a patent to the land on the same date.

On December 27, 1860, the certificate issued to John Nikles was cancelled by the General Land Office, Department of the Interior, because of conflict with the Hiram Walker entry.

On April 26, 1862, the warrant pursuant to which Hiram Walker had made entry of the land in question was cancelled and the Hiram Walker entry pursuant to the warrant No. 37294 was cancelled on April 26, 1862.

Notwithstanding the cancellation of the certificate to John Nikles, he continued in possession of the property which is evidenced by the following letter:

"Springfield, Illinois
June 20, ..62

Sir:

In reply to your letter of March 15, ..62, in which you inform me that the Entry of the Northeast Half of Section 13, Township 10 South, Range 4 West of the Third Principal Meridian, made by John Nikles

November 12, ..60, for actual settlement had been cancelled because the same tract of land had been previously sold and embraced in location of Warrant No. 37294 Act of 55 made by Hiram Walker. I would respectfully submit Mr. Nikles is a poor man and is at present residing upon said land with his family and has made considerable improvements on the same and in consideration that he had already filed in your office Hiram Walker's relinquishment of all his right to said land by virtue of his location above mentioned together with his (Walker's) request that he (Mr. Nikles) might be permitted to enter the said tract of land he now respectfully asks if any objections exist why his entry of said land made on the 12th day of November, ..60, and subsequently cancelled should not now be reinstated and Patented.

If Mr. Walker's relinquishment in favor of Mr. Nikles never reached your department, Mr. Nikles can obtain another and send to you forthwith.

I am very respectfully (sic)

S. C. Gibson

Hon. J. (?) Edmund
Washington, D.C."

Nowhere in the evidence does there appear a relinquishment by Hiram Walker in favor of John Nikles. If such document ever existed, the land records of the Bureau of Land Management, United States Department of Interior, fail to show that such document was ever received.

Defendant in its reply brief asserts:

> "When Hiram Walker relinquished his rights in the land in question on August 4, 1860, he was the only one who had ever made a claim to the land."

No such relinquishment appears in any of the documents presented, nor has the existence of such a document been established unless Hiram Walker's reply to the Land Office of August 4, 1860, as set out hereinabove, is deemed by the defendant to be a relinquishment. The Court does

not construe, nor does it believe, that the Walker letter of August 4, 1860, was meant to be a relinquishment of the claim. It is also apparent that the Land Office did not consider the same to be a relinquishment, since no action was taken to cancel the Walker entry until the original warrant had been cancelled on April 26, 1962.

Defendant urges that Moss v. Dowman, 176 U.S. 413 (1900), is controlling.

In Moss (supra) the Court said:

"At the moment of filing that relinquishment, Dowman, the defendant, was a settler in occupation of the tract, and Moss, the plaintiff, made her application to enter, and the question is as to the relative rights, at the moment the land becomes open to entry, of one a settler in actual occupation and one making a formal entry in the land office. For reasons heretofore stated, we have no doubt that the settler is entitled to preference. It is true he must perfect his right of settlement by making an entry in the land office, and section 3 of the act of May 14, 1880, 21 Stat. 140, heretofore referred to, provides:

" 'That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preemption laws.'

"Within less than thirty days from the filing of Doran's relinquishment Dowman made a formal entry in the land office, and that entry, based upon actual possession, is entitled to preference over an entry without possession."

The land in question at the time Nikles made his entry was already subject to an entry which remained uncancelled of record and which was not cancelled of record until after Nikles' entry had previously been cancelled.

In Dowman the defendant was a settler in occupation (a prior entry was relinquished) at the time of relinquishment, and the land was being occupied by Dowman with intent to claim the same under the Homestead Law. After the relinquishment, the land became subject to entry. During the time it was subject to entry Dowman made formal entry in the Land Office based on actual possession. Here, although Nikles was a settler in actual possession at the time the Land Office cancelled Hiram Walker's entry, no subsequent action was taken to officially remove the land from the public domain. Accordingly, Dowman is not authority upon which this Court could substantiate the Nikles claim.

In McMichael v. Murphy, 197 U.S. 304 (1905), the Court had the following to say:

> "The particular question involved in this case is whether a settlement or entry on public land already covered of record by another entry, valid upon its face, gives the second entryman any right to the land, notwithstanding the first entry may subsequently be relinquished or be ascertained to be invalid by reason of facts dehors the record of such entry."

That Court held that the entry, being prima facie valid, removed the land, temporarily at least, out of the public domain and beyond the reach of other homestead entries, stating that: "Generally, a homestead entry while it remains uncancelled withdraws the land from subsequent entry." and held that the previous entry, being prima facie valid, so long as it remain undisturbed of record had

the effect to segregate the lands from the public domain and make them not subject to entry.

In Hodges v. Colcord, 193 U.S. 192 (1904), the Court, after considering several previous decisions, had the following to say:

> "'In the light of these decisions the almost uniform practice of the department has been to regard land, upon which an entry of record valid upon its face has been made, as appropriated and withdrawn from subsequent homestead entry, preemption settlement, sale or grant until the original entry be cancelled or declared forfeited; in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws.'"

The Court held that a prior entry, although ineffectual to vest any rights in the entryman, and therefore void as to him, was such an entry as prevented the acquisition of homestead rights by another until it had been set aside.

All of the facts here submitted by both parties show that the land in question was entered first by Hiram Walker and subsequently was entered by defendant's predecessor in title, namely, John Nikles. While the Walker entry remained undisturbed of record, no subsequent entry could be considered. The land having been segregated from the public domain, it was, therefore, not subject to subsequent grants.

The Nikles entry was made at a time when the land had been segregated from lands subject to entry and, accordingly, the Land Office was without power to make the grant. Upon determination that the Nikles entry was in conflict with a prior entry, the Land Office properly cancelled the Nikles grant.

The fact that the Hiram Walker grant was later cancelled has no effect on the Nikles claim, since no official

action was taken by Nikles subsequent to the cancellation of the prior Walker grant. It is true that the letter of June 20, 1862, written on behalf of Nikles, requested that the Land Office reconsider his previous entry and asked that his entry be reinstated and patented, but no official action was ever taken. The letter referred to a relinquishment by Walker in favor of Mr. Nikles; however, no such relinquishment appears, nor does it appear that any subsequent official action was taken by anyone to remove the land in question from the public domain. Accordingly, the Presidential Proclamation, dated September 6, 1939, set aside the land in question as a part of the Shawnee National Forest.

The Court finds that defendant's motion for leave to renew motion for summary judgment should be denied since the defendant is not entitled to summary judgment.

The Court further finds that there is no genuine issue as to any material fact and finds that the United States of America, plaintiff, is entitled to judgment in its favor as a matter of law.

The Court further finds that plaintiff is not entitled to damages in the amount of $500.00, which it prays, there being no evidence upon which to substantiate such prayer.

Parties to settle the order.

/s/ William G. Juergens
UNITED STATES DISTRICT JUDGE

DATED: August 24, 1965

APPENDIX "E"

JUDGMENT

This action came on for hearing on plaintiff's motion for summary judgment and defendant's motion for leave to renew motion for summary judgment, and the court having considered the pleadings, the factual material submitted with the respective motions and the briefs of the parties finds that there are no genuine issues as to any material facts and that the plaintiff is entitled to a judgment as a matter of law, except with respect to its claim for damages.

Now therefore it is ordered, adjudged, and decreed:

1. That plaintiff's motion for summary judgment is granted;

2. That defendant's motion for leave to renew motion for summary judgment is denied;

3. That the plaintiff is entitled to possession of that part of the southwest quarter of the northeast quarter (SW¼ NE¼) section thirteen (13), township ten (10) south, range four (4) west, Jackson County, Illinois, more particularly described as, a strip of land approximately one hundred feet (100') in width and approximately twenty (20) chains in length extending along and adjoining the south boundary thereof;

4. That the defendant remove its electric transmission power lines, including all poles, wires and other property and equipment located on the above-described land;

5. That the defendant is enjoined from further occupying or using the premises except as may be authorized by the plaintiff; and

6. That the plaintiff is allowed its costs.

/s/ William G. Juergens
UNITED STATES DISTRICT JUDGE

DATED: September 23, 1965

APPENDIX "F"

At a Court of Common Pleas begun and held at the Court House in the City of Canton, within and for the County of Stark and State of Ohio, on Monday the 28th day of February, A.D. 1859, present:

HON. LYMAN W. POTTER, *Judge*

Samuel Beatty, Sheriff
John Lahm, Clerk

In the Record and proceedings of said Court then and there had, among other things are the following, towit:

George W. Raff
v.
James Bowman et al. } Civil Action

The defendants having all been legally notified of the pendency of said petition, and having all failed to appear, and to answer or demur to the same, this cause now comes on for hearing upon the said petition, the exhibits filed therewith, and the testimony. And upon examination of the witnesses in open Court the Court finds that some time in the winter of 1856-7, the said plaintiff, for a full and valuable consideration purchased of Isabella Bowman, then in full life, but since deceased, Land Warrant No. 37294, for 160 acres of land, which issued under the Act of Congress of March 3, 1855, to said Isabella Bowman, as widow of Joseph Bowman, deceased, for the services of said Joseph Bowman in the war with Great Britain declared by the United States on the 18th day of June, 1812. That an assignment of said Land Warrant to said Raff was duly executed and acknowledged by said Isabella Bowman in her life time, according to the form prescribed by the Com-

missioner of the General Land Office, and was endorsed upon said warrant. That said Warrant was, on the 26th day of April, A.D. 1857, stolen from said George W. Raff at St. Louis, in the State of Missouri, and that since that time said Raff has not been able to recover the possession of the same, nor to discover where said Warrant is. That said Raff never sold, assigned, transferred, or in any other manner disposed of, or voluntarily parted with the possession of said Land Warrant, to any person, for any purpose whatsoever. The Court further finds that such proceedings were subsequently had that a duplicate of said Land Warrant No. 37294 was issued to the said Isabella Bowman, and delivered to the said George W. Raff; and that after the issuing of said duplicate warrant, and before an assignment of the same could be procured by said George W. Raff, towit, on the 17th day of July, A.D. 1858, the said Isabella Bowman died, leaving James Bowman, Nancy Kennedy, Isabella Henry, Margaret Thompson, Mary Ann Long, Joseph Bowman, Robert Bowman, Catharine Lynch, Jeremiah Bowman and Ephraim Bowman, her only children and heirs at law, all of whom are of full age, and all of whom are parties defendant to this action. And the Court finds that as against the said heirs at law, and all other persons, the said George W. Raff is legally and equitably entitled to said duplicate Land Warrant No. 37294. The Court therefore orders, adjudges and decrees that the legal and equitable title to said duplicate Land Warrant No. 37294, for 160 acres land, which issued as aforesaid to the said Isabella Bowman, to be in the said George W. Raff, and that said Raff be, and hereby is, empowered to locate or assign said duplicate Land Warrant, as fully and completely as though the same had been assigned to him in due form by said Isabella Bowman, before her decease, and that said James Bowman, Nancy Kennedy,

Isabella Henry, Margaret Thompson, Mary Ann Long, Joseph Bowman, Robert Bowman, Catharine Lynch, Jeremiah Bowman and Ephraim Bowman, and their heirs, be forever enjoined from setting up or claiming any title to or in said duplicate Land Warrant, and from disturbing said Raff and his assigns in the peaceable possession thereof, or the land located therewith.

APPENDIX "C"

At a Court of Common Pleas begun and held at the Court House in the City of Canton, within and for the County of Stark and State of Ohio, on Monday the twenty fourth day of October, in the year eighteen hundred and fifty nine,

Present: Hon. John W. Clinch
Hon. Jacob A. Ambler
Judges

Samuel Beatty, Sheriff — William F. Evans, Clerk

In the record and proceedings of said Court then and there had, among other things are the following, towit:

* * * *

And afterwards, towit, now at this same term of the said Court of Common Pleas, continued and held at Canton aforesaid, on the ninth day of December, in the year eighteen hundred and fifty nine, the said defendant Hiram Walker having been legally notified of the pendency of this cause, and having failed to appear and plead, answer or demur to the plaintiff's petition, this cause now comes on for hearing upon the said petition and the testimony. And the Court, upon examination of disinterested witnesses in open Court, finds that on the second day of September, in the year eighteen hundred and fifty six, the said plaintiff, for a full and valuable consideration, purchased of Isabella Bowman Bounty Land Warrant No. 37294, for one hundred and sixty acres land, which issued to the said Isabella Bowman, as widow of Joseph Bowman, deceased, under the Act of Congress of March 3, 1855, and took her assignment of the same in due form, except that the name of said George W. Raff was not inserted as assignee, but a blank

place was left in said assignment where the name of said assignee ought to have been. That said assignment was dated on said second day of September, 1856, and was attested by two witnesses, and duly acknowledged before Samuel Slanker, Esq., a Justice of the Peace within and for the County of Stark and State of Ohio, whose certificate of acknowledgement was appended to said assignment, in due form. That said Land Warrant was afterward, on the twenty sixth day of April, 1857, stolen from said George W. Raff, at Saint Louis in the State of Missouri, by some person or persons unknown to him; and that since that time the said Raff has not been able to recover possession of said warrant. That said Raff never sold, assigned, transferred or in any other manner disposed of said warrant to any person for any purpose whatsoever; and that from the date of purchase aforesaid, the title, both legal and equitable, in and to the said Warrant, has been, and still is, in the said George W. Raff, subject only to the legal rights of the holder of a duplicate of said Warrant which the Court finds was issued by the Pension Office of the United States and delivered to the said George W. Raff, who subsequently assigned and transferred the same to another party; but where said duplicate Warrant now is or who the legal owner thereof is cannot be ascertained.

The Court is further advised that Hiram Walker, the defendant in this action, now claims title to said Warrant by assignment from the said Isabella Bowman dated the second day of September, 1856; but the Court finds that said assignment is the same that was executed by the said Isabella Bowman to the said George W. Raff in blank, as aforesaid, and that said Hiram Walker, or some other person for him, unlawfully, without authority, and in fraud of the rights of said Raff, inserted the name of said Hiram

Walker in said original assignment as assignee of said Isabella Bowman; and that said Hiram Walker has no legal claim whatsoever to said Warrant.

The Court therefore adjudges the title, together with the right of possession of, to and in said original Bounty Land Warrant No. 37294, which issued as aforesaid to the said Isabella Bowman, to be in the said George W. Raff, subject to the rights of the legal holder of the aforesaid duplicate of said Warrant, and hereby forever enjoins the said Hiram Walker, his heirs and assigns from selling, assigning, transferring, locating, or in any other manner disposing of or using said Land Warrant, or exercising any rights of ownership over the same.

APPENDIX "H"

Act of March 3, 1855.

NOTICE

GENERAL LAND OFFICE

August 29th, 1859.
523 Springfield, Ill.

Sir:

Bounty Land Warrant No. 37294 for 160 acres, issued in the name of Isabella Bowman, widow of Joseph Bowman Ensign Penn Militia War 1812 has been returned to this Office located IN THE NAME of Hiram Walker, of Sangamon Co. Ill., at the Land Office at Springfield, Ill., in virtue of an assignment purporting to be from said Isabella Bowman the Warrantee executed on the 2nd day of Sept 1856, in favor Hiram Walker in presence of the following witnesses, Sam Slanker & Robt Bowman and acknowledged before Samuel Slanker J.P. dated Sept 2nd 1856 at Stark Co. Ohio.

Upon a Caveat dated June 30th 1857 from Geo W. Raff of Stark Co. Ohio, who alleges that he has never assigned or transferred said warrant, the issue of a patent to you as assignee of Isabella Bowman, the Warrantee is suspended, and the object of this is to call upon you to produce without delay such evidence as it may be in your power to present in support and vindication of the fairness and bona fide character of the assignment under which you claim.

A period of 90 days from the receipt of this notice will be allowed you, within which time the evidence now called for is required to be filed in this Office; in default of which, this office will feel at liberty to take final action in the case,

by determining the party who shall be recognized as the actual owner of the warrant.

Very respectfully,
Your obedient servant,
Joseph Wilson
Acting Commissioner.

Hiram Walker Esq
Sangamon Co.
Illinois

APPENDIX "I"

Affidavit for Actual Settlement and Cultivation.

No. ..... Land Office at Springfield, Ills

I, John Nikles of Lasalle county, Illinois having applied to enter the NE ¼ of section No. 13, in township No. 10 S. of range No. 4 W 3rd p.m., under the act entitled "An Act to graduate and reduce the price of public lands to actual settlers and cultivators," approved August 4, 1854, do solemnly swear that I enter the same for my own use, for actual settlement and cultivation; and that, together with said entry, I have not acquired from the United States, under the provisions of said act, more than three hundred and twenty acres, according to the established surveys; and further, that the said land is not now in the occupancy of any actual settler whose settlement thereon existed at the date of said law.

John Nikles

.....

Sworn to and subscribed before me this 4th day of Feby, 1860.

S. C. Gibson

Notary Public
City of Springfield, Ills

(SEAL)

APPENDIX "J"

Springfield, Ill.
May 30, . .60

Sir:

I wrote you on the 22nd last Feby in regard to the case of the cancellation of Land Wt No. 37294 located by Hiram Walker on the NE ¼ Sec. 13 T. 10 S, R 4 W, 3rd P.M. in the Kaskaskia now Springfield Dist Illinois.

Mr. Walker is anxious for a reply to said letter. Will you have the kindness to address me on the subject.

I am very respectfully
Your obt svt
S. C. Gibson

Hon
Joseph Wilson
Com G.L.O.
Washington
D.C.

APPENDIX "K"

Kaskaskia

No. 28954 LAND OFFICE at Springfield, Illinois, November 12th, 1860

It is hereby certified, that in pursuance of Law, John Nikles Lasalle County, State of Illinois on this day purchased of the Register of this Office, the Lot or North East quarter of Section No. Thirteen in Township No. Ten South of Range No. four West 3 rd P.M. containing One Hundred Sixty acres, at the rate of 12½ cents per acre, amounting to Twenty dollars and ..... cents for which the said John Nikles has made payment in full as required by law.

Now, therefore, be it known, That on presentation of this certificate to the COMMISSIONER OF THE GENERAL LAND OFFICE, the said John Nikles shall be entitled to receive a Patent for the Lot above described.

Wm. E. Keefer, Register

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 829

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–3a) is reported at 365 F. 2d 121.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1966. A petition for rehearing was denied on September 7, 1966. The petition for a writ of certiorari was filed on December 5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's predecessor in title acquired no interest

in the public domain because his certificate entitling him to a patent was properly cancelled.

STATEMENT

This suit was brought by the United States to abate a trespass on its lands located within the boundaries of the Shawnee National Forest in Jackson County, Illinois. Petitioner, Central Illinois Public Service Company, has constructed and maintains electric power transmission lines across the national forest, claiming a right of way to a strip of land approximately 100 feet in width and approximately 1,320 feet in length. Petitioner claims under mesne conveyances from one John Nikles, who entered the land, allegedly a part of the public domain, on February 4, 1860, and later, on November 12, 1860, was issued a certificate entitling him to a patent. The official records of the Bureau of Land Management, Department of the Interior, show that on May 13, 1857, a prior entryman, Hiram Walker, entered the land as the assignee of a military warrant for bounty land issued to Isabella Bowman. The land office cancelled Nikles' certificate on December 27, 1860, since it was in conflict with the earlier Walker entry. The Walker entry was subsequently cancelled by the land office on April 26, 1862, when it was found by a court that the warrant Walker possessed had been stolen from its original owner (Pet. App. 7a–9a, 25a–32a).

The United States claims that its legal title to this property was never divested and the land, being unpatented and undisposed public land, was officially withdrawn from all forms of entry and set aside as

part of the Shawnee National Forest by Presidential Proclamation No. 2357 on September 6, 1939 (4 Fed. Reg. 3860, 54 Stat. (Pt. 2) 2649). The two courts below sustained the government's claim.

ARGUMENT

The decisions below are correct and not in conflict with decisions of any other courts. Hence, further review by this Court is not warranted. The undisputed evidence conclusively shows that the Nikles' entry was in conflict with the then outstanding Walker entry. The law is well established that an entry on public land which is *prima facie* valid, even though subsequently declared void, segregates the land from the public domain and prevents a second entryman from obtaining any interest in it until the prior entry has been set aside by the land department. *Hastings, Etc., Railroad Co.* v. *Whitney,* 132 U.S. 357, 361; *Hodges* v. *Colcord,* 193 U.S. 192, 196; *McMichael* v. *Murphy,* 197 U.S. 304, 311; *James* v. *Germania Iron Co.,* 107 Fed. 597, 603, 610 (C.A. 8). Accordingly, the land in issue here was not subject to entry at the time of the Nikles' entry and the land office was fully authorized to correct the error of its local registers and to cancel the Nikles' certificate. *Cornelius* v. *Kessel,* 128 U.S. 456, 461; *Orchard* v. *Alexander,* 157 U.S. 372, 382; *Boesche* v. *Udall,* 373 U.S. 472, 479.

In view of the clearly conflicting entries on the records, which Nikles never denied, there was no

question to be resolved by a hearing as urged by petitioner (Pet. 13). Moreover, there is no evidence showing that Nikles, who had notice of the cancellation (Pet. App. 17a–18a), ever asked for a hearing or that he was ever denied one by the land office.

Petitioner's contention that Walker relinquished the land in favor of Nikles (Pet. 19–32) is without merit. The official records reveal no relinquishment by Walker, no use of a relinquishment by Nikles and no acknowledgment of a relinquishment by the land office.[1] Moreover, the letters which petitioner claims constitute Walker's relinquishment (Pet. 8, 9; Pet. App. 9a–10a)[2] do not purport to divest Walker of any right, title or interest he might have had in the land by virtue of his prior entry. The letters contain no words expressing Walker's intent to sell, grant or convey any interest in the property to Nikles. The authorities cited by petitioner (Pet. 20–23) are based in each case on a valid, completed withdrawal or relinquishment; they are not in point here.

---

[1] The records show that the true owner of the land warrant satisfied the interest it conveyed when he used it to settle on land in Nebraska.

[2] The letter dated February 22, 1860 (Pet. 8–9; Pet. App. 9a), was tendered by petitioner as newly discovered evidence of a relinquishment, in its petition for rehearing (Pet. 32). In addition to not meeting the above argument, the petition for rehearing and its purported new evidence (Pet. 4a–12a) did not comply with Rule 60(b)(2), F.R. Civ. P., in that it presented no justification for failure to discover the evidence at the time of trial or even on appeal. The evidence was on file in the National Archives of the United States, was available at the time of trial and could have been found by the exercise of due diligence.

The presumption of a lost record or grant relied on by petitioner (Pet. 26–32) is clearly rebutted by the official record on the tract book showing that Nikles' entry was cancelled on December 27, 1860. The records of the Department of the Interior further show that Nikles admitted receiving notice of that cancellation (Pet. App. 17a–18a). Petitioner's presumption is also rebutted by the Presidential Proclamation of 1939, *supra*, p. 3. Its publication in the Federal Register and Statutes at Large—15 years prior to petitioner's purchase—put all on legal notice of the withdrawal from entry of unpatented lands within the described national forest. Act of July 26, 1935, Sec. 7, 49 Stat. 502, 44 U.S.C. 307; *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384–385.

Petitioner's contention that the United States did not assert any right or claim to the land (Pet. 31) is without significance. The law is clear that laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest. *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 409; *United States* v. *State of California,* 332 U.S. 19, 39–40.

The critical factor in this case is that the official records of the Bureau of Land Management disclose that no patent to the land has even been issued to anyone. There is no evidence that Nikles or any of his successors in possession ever perfected valid title after the Walker cancellation, even though there was a procedure for doing so. Moreover, a title search in 1954, when petitioner purportedly purchased the easement,

should have, or did, reveal the absence of a patent and, thus, a serious defect in the chain of title. That defect, taken together with the Presidential Proclamation of 1939 (*supra*, p. 3), published in the Federal Register and Statutes at Large, which showed by plat that this land was part of the national forest, should have put petitioner on notice of the government's continuing interest in the property. Hence, the United States has never been divested of its legal or equitable title to the property. *Brown* v. *Hitchcock*, 173 U.S. 473, 476; *Cameron* v. *United States*, 252 U.S. 450, 460; *Best* v. *Humboldt Mining Co.*, 371 U.S. 334.

CONCLUSION

For the reasons given, we respectfully submit that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
EDWIN L. WEISL, JR.,
Assistant Attorney General.
S. BILLINGSLEY HILL,
ROBERT M. PERRY,
Attorneys.

JANUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967